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No. 09-1186

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IN THE

# Supreme Court of the United States

JOHN ERROL FERGUSON
OR DOROTHY FERGUSON, INDIVIDUALLY
AND AS NEXT FRIEND ON BEHALF OF
JOHN ERROL FERGUSON,

*Petitioners,*

v.

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS,
WALTER A. MCNEIL,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

1. The brief in opposition (Opposition) spends 43 pages attempting to harmonize the Eleventh Circuit's novel rule with the decisions of this Court and at least four other circuit courts. But what the Opposition notably fails to do in those 43 pages is to explain why, at the very least, this Court should not enter a grant-vacate-remand (GVR) order so that the Eleventh Circuit may reconsider its decision in light of *Porter* v. *McCollum*, 130 S. Ct. 447 (2009). And for good reason: As this Court recently reaffirmed, a "GVR is appropriate when 'intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter." *Wellons* v. *Hall*, 130 S. Ct.

727, 731 (2010) (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)).

That is precisely the case here. *Porter* is no doubt a significant "intervening development[ ]," given that it issued three months after the panel below handed down its decision. There is also a "reasonable probability" that the panel below—which contained two of the three judges who sat on the panel in *Porter*—would reconsider their decision if given an opportunity to do so. After all, this Court summarily reversed the Eleventh Circuit in *Porter* because the panel had focused almost exclusively on the "heavy weight" of aggravating factors, *Porter* v. *Attorney General*, 552 F.3d 1260, 1274 (11th Cir. 2008), instead of evaluating whether the sentencing jury was deprived of hearing "evidence which 'might well have influenced the jury's appraisal of [the defendant's] moral culpability." *Porter*, 130 S. Ct. at 454 (citation omitted). Not surprisingly, that same flawed approach—focusing solely on the "extreme" facts of the crimes, App. 20a—was embraced by the panel below. And given that, as in *Porter*, Ferguson's "judge and jury at * * * sentencing heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability," *Porter*, 130 S. Ct. at 454, a remand with instructions to reconsider in light of *Porter* "may determine the ultimate outcome of the matter." *Wellons*, 130 S. Ct. at 731 (citation omitted).

The GVR mechanism, in short, was designed for precisely these sorts of cases. And the Opposition's failure to join issue on that point only confirms that this Court should follow its established practice, grant the petition, and remand so that the Eleventh

Circuit may reconsider this capital habeas case under the correct legal standard that this Court articulated in *Porter*.

2. Although this case warrants at least a GVR, it is also an excellent vehicle for resolving on a plenary basis the lingering divisions over how to properly assess prejudice at the capital sentencing phase under *Strickland* v. *Washington*, 466 U.S. 668 (1984). The Opposition insists otherwise, but its principal objection is that ineffective-assistance-of-counsel claims by death row inmates are "fact-specific claims" that do not warrant review. Opp. 20. But that was the *exact* same refrain Respondent sang in opposing certiorari in *Porter*. *See* Opp. Br. in *Porter* v. *McCollum*, No. 08-10537, at 20-21. This Court did not accept that theory then; it should not accept it now.

In the same vein, the Opposition suggests that the petition "merely implicate[s] an alleged 'misapplication of a properly stated rule of law.' " Opp. 21 (quoting Sup. Ct. R. 10). Not so. The Eleventh Circuit applied a rule of law that this Court has never embraced: that a petitioner sentenced to death is not prejudiced by counsel's failure to produce mitigating evidence about mental health, privation, and childhood violence unless that evidence would reasonably "lead a jury to *disregard* [the] cruel circumstances" of the crime. App. 20a (emphasis added). That formulation of the *Strickland* test is demonstrably wrong. Never has this Court insisted that mitigating evidence be so potent that it lull a jury into forgetting about the brutality that attends any first-degree murder. To the contrary, this Court has emphasized—and

reaffirmed in *Porter*—that what matters in the calculus is the petitioner's moral culpability: Did counsel's failure to discover and present mitigating evidence deprive the jury from learning about "evidence which 'might well have influenced the jury's appraisal of [Ferguson's] moral culpability." *Porter*, 130 S. Ct. at 454 (quotation omitted); *see Rompilla* v. *Beard*, 545 U.S. 374, 393 (2005); *Wiggins* v. *Smith* 539 U.S. 510, 535 (2003); *Williams* v. *Taylor*, 529 U.S. 362 (2000).

Although the Opposition soothingly assures this Court that the decision below reflects a "reasonable application of *Strickland*," Opp. 28-29, it never actually explains how the rule that the Eleventh Circuit articulated can be squared with this Court's precedents. Indeed, the Opposition confirms the confusion that pervades this area of law and why certiorari is warranted. Thus the Opposition posits that Ferguson failed to demonstrate prejudice because none of the undiscovered mitigating evidence "would have *explained or justified* the defendant's actions in committing these murders so as to warrant life sentences." Opp. 29-30 (emphasis added). But, of course, this Court has never held that mitigating evidence must rationalize a first-degree murder. After all, evidence showing that a homicide was justified or excused would presumably undermine the entire conviction for first-degree murder. But in any event, the important point is that even the gloss on the Eleventh Circuit's rule offered by the Opposition roundly conflicts with *Porter* and this Court's other precedents.

Respondent nevertheless maintains that there is no conflict with *Porter* because, in Respondent's view,

*Porter* speaks only to missing mitigation evidence about *military service*. Opp. 22. Respondent is mistaken. To begin with, the petitioner's military service was just one of *four* distinct categories of undisclosed mitigating evidence that this Court examined in *Porter*. *See Porter*, 130 S. Ct. at 454. And one of those other categories—mental-health deficiencies—preceded this Court's discussion of military service. *Id.*

But more importantly, *Porter* is simply the latest in a line of precedents addressing whether unpresented mitigation evidence, including evidence of mental health, mental impairment, family background, *or* military service, would have " 'altered the sentencing profile presented' " during the penalty phase by "humaniz[ing]" the defendant beyond his crimes and thereby "allow [the jury] to accurately gauge his moral culpability." *Id.* Just as in *Porter*, this case involves counsel's failure "to present the most significant mitigation readily available to [the defendant]"—which for Ferguson involved his mental health history during nearly a decade spent in state-run mental hospitals and his debilitating childhood experiences.

Nor can *Porter* be distinguished on its facts, as Respondent also suggests. Opp. 21. *Porter* involved multiple murders, multiple aggravating factors (three, including a finding that the murders were "committed in a cold, calculated, and premeditated manner"), and a failure to present any significant mitigating evidence during the sentencing phase of the trial, even though significant mitigation evidence—including evidence concerning the defendant's history of mental-health issues and his

abusive childhood—was readily available. *Id.* at 449. So too here, across the board. Far from supplying any credible reason to distinguish the two cases, the factual commonalities between the two reinforce why *Porter* is outcome determinative here.

Seeking to downplay counsel's egregious lapses, Respondent also tries to characterize the uninvestigated and unpresented mental-health mitigation evidence as "selective" or "conflicting." Opp. 2, 3, 29. There is nothing remotely "selective" or "conflicting" about this evidence. At least seven different state-appointed doctors examined Ferguson at least eleven times during his nearly decade-long hospitalization. Every single one of them diagnosed him as schizophrenic, psychotic, or hallucinating and reported that his judgment was impaired and he was unable to appropriately differentiate right and wrong. Hrg.Exs.34-43; R.1589-1601.[1]

Respondent's final attempt to explain away the conflict with *Porter* is to conflate evidence of competency and mitigation. Respondent suggests that a capital defendant cannot be prejudiced by unpresented mental-health mitigating evidence if a jury rejected an insanity defense. Opp. 2-3, 22.

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[1] Empirical studies have repeatedly found that this kind of mental-health mitigation evidence powerfully resonates with jurors. *See, e.g.*, Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 Am. U. L. Rev. 1645, 1652–53 (2008) (empirical studies find "special mitigating weight" for evidence of mental illness or defect and childhood abuse); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1564-65 (1998) (empirical research shows that a majority of jurors would be less likely to vote for death "if the defendant had a history of mental illness").

Wrong. To begin with, there is a significantly higher standard for a successful insanity defense than is required for a jury to vote for a life sentence. *See* Pet. 13 n.3 (citing cases). Moreover, it is well-settled that "[a]s a legal matter, a mental illness mitigation defense to the imposition of a death sentence may be available even if an insanity defense to the murder charge is not." *Stevens* v. *McBride*, 489 F.3d 883, 897 (7th Cir. 2007).

3. Certiorari is also warranted based on the conflict identified in the Petition between the Eleventh Circuit's decision and *Rompilla*, 545 U.S. at 378, *Wiggins*, 539 U.S. at 534-538, and *Williams*, 529 U.S. at 390-393. Pet. 22-25. The Opposition offers at best a perfunctory response to these conflicts. All Respondent has to say about the conflict with *Rompilla* and *Williams* is that neither of these cases made new law. Opp. 21. And all Respondent has to say about *Wiggins* is that no conflict exists because it views the unpresented mitigating evidence for Wiggins as "more compelling." Opp. 33.

There is no question that the Eleventh Circuit's prejudice analysis contradicts the way this Court has approached the prejudice inquiry in each of these recent cases. In *Rompilla*, the jury sentenced a defendant to death after finding three aggravating circumstances where his counsel's only mitigation case was family members asking for mercy; counsel failed to investigate any of the leads to mitigation evidence about the defendant's generally disadvantaged upbringing, "extreme mental disturbance," or childhood physical abuse. 545 U.S. at 390-393. In finding his counsel's desultory efforts prejudiced Rompilla, the Court recognized that the

unpresented mitigating evidence "might well have influenced the jury's appraisal of [Rompilla's] culpability" because it amounted "to a mitigation case that b[ore] no relation to the few naked pleas for mercy actually put before the jury." *Id.* at 393.

*Williams* similarly holds that unpresented mitigating evidence "may alter the jury's selection of a penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." 529 U.S. at 398. And *Wiggins* stands for the clear proposition that privation and debilitating mental-health issues in a defendant's past are directly relevant to a moral culpability assessment. 539 U.S. at 534 (citing *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989); *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982); and *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978)). Thus, these cases all make clear that even where a case is death-eligible because of "cruel" or "extreme" facts, unpresented mitigating evidence can undermine confidence in the jury's selection of a death sentence.[2] In conflict with these cases, the Eleventh Circuit discounted the impact of all of the extensive unpresented mitigating evidence based on the "extreme" facts and numerous aggravating factors involved. App. 18a-20a, 23a.

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[2] The Opposition dismisses the conflict with *Wiggins* on the basis that it makes Ferguson's life history look "unremarkable," apparently because Ferguson was not physically or sexually abused. Opp. 33. This ignores that Ferguson grew up in extreme poverty, witnessed and intervened in repeated physical abuse of his mother, was deserted in an abandoned farmhouse, had an alcoholic father, was shot in the head at age 21, and was hospitalized for nearly 10 years with such debilitating diagnoses as schizophrenia, psychosis, and hallucinations. Pet. 5-10.

4. The Eleventh Circuit is out of step with the other circuits on how to assess prejudice resulting from unpresented mitigation evidence. Even where crimes involve horrible facts and multiple aggravating factors, the Sixth, Eighth, Ninth, and Tenth Circuits have faithfully followed this Court's approach to the prejudice inquiry. *See* Pet. 26-32. The Eleventh Circuit is alone in adopting what amounts to a "brutality trumps" inquiry whereby a brutal crime can categorically defeat the prejudice prong of the ineffective-assistance analysis. *Walbey* v. *Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009) (rejecting "brutality trumps" prejudice inquiry).

Respondent contends there is no circuit conflict only by, again, resorting to the refrain that ineffective assistance claims by death-row inmates are "fact dependent" applications of law that cannot establish a conflict. Opp. 34. And instead of attempting to harmonize the Eleventh Circuit's rule with the rule applied by the circuits identified in the petition, Respondent reduces his analysis to nothing more than meaningless parantheticals. Opp. 34.

But the conflict between the Eleventh Circuit and at least the Sixth, Eighth, Ninth, and Tenth Circuits on how to approach prejudice is sharp. The Tenth Circuit's decision in *Smith* v. *Mullin*, 379 F.3d 919 (10th Cir. 2004), exemplifies the circuit split. The Tenth Circuit found prejudice resulting from counsel's deficient representation of a defendant who received five death sentences involving 24 aggravating circumstances. *Id.* at 924, 944. Respondent attempts to characterize that case as involving a "single impulsive criminal episode," Opp. 34, but that had nothing to do with the Tenth

Circuit's prejudice analysis. The court's analysis instead turned on counsel's "meager presentation of mitigating evidence," given the "significant" mitigating evidence that could have been—but was not—presented. *Smith*, 379 F.3d at 939, 941. Recognizing that juries " 'are more likely to vote for life rather than death sentences in cases where there is * * * clear and clearly presented evidence that the defendant has suffered from some form of mental illness,' " the Tenth Circuit found prejudice in the failure of Smith's counsel to present this evidence. *Id.* (citation omitted). That decision—and others like it—squarely conflicts with the Eleventh Circuit's decision below.[3]

5. In a final bid to defeat certiorari, the Opposition spills much ink attempting to show that Ferguson's counsel did not actually render constitutionally ineffective assistance. Opp. 22, 30-31. But that question is irrelevant because the Eleventh Circuit expressly assumed below that Ferguson's counsel were indeed deficient. App. 18a, 22a-23a.

And for good reason. Ferguson's counsel for the Carol City trial admitted during the post-conviction hearing below that there were "no strategic reasons" for failing to investigate and introduce Ferguson's substantial mental-health evidence. R.3051. And he conceded that, had he known of the 11 psychiatric reports generated during Ferguson's near-decade-long stint in mental hospitals—all of which

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[3] *See also* Pet. 26 n.7, 29-32 (discussing *Correll* v. *Ryan*, 539 F.3d 938, 940 (9th Cir. 2008); *Simmons* v. *Luebbers*, 299 F.3d 929 (8th Cir. 2002); *Dickerson* v. *Bagley*, 453 F.3d 690, 691, 696 (6th Cir. 2006); *Gray* v. *Branker*, 529 F.3d 220, 236 (4th Cir. 2008); *Walbey*, 309 F. App'x at 804)).

consistently documented a severely schizophrenic and disturbed man—he "probably would have" used them during the sentencing phase. R.3035. Respondent ignores all this, emphasizing instead that Ferguson's counsel was not ineffective because he "interviewed those closest to him." Opp. 31. But that is disingenuous, to say the least. Counsel did speak to Ferguson's mother, but it is undisputed that he asked her *nothing* about Ferguson's upbringing. R.2946.

In the Hialeah trial, counsel was equally deficient. He failed to investigate *any* aspects of Ferguson's troubled childhood because he erroneously believed that such nonstatutory mitigating evidence would not be admissible. R.3165-66. As this Court has recognized, counsel is undeniably ineffective when he makes judgments based on a clear mistake of law. *See Williams*, 529 U.S. at 395.

6. Finally, the Opposition fails to refute that the Eleventh Circuit's *Hitchcock* analysis does not square with this Court's precedent. Instead, Respondent reprises its refrain that the issue is not cert-worthy because it implicates factual disputes over the application of the harmless-error standard. Opp. 36. But this Court often addresses issues in criminal cases that involve proper application of a harmless-error analysis. *See, e.g.*, *Smith* v. *Texas*, 550 U.S. 297, 316 (2007); *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008); *Neder* v. *United States*, 527 U.S. 1 (1999); *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). These issues are of great importance to defendants and prosecutors alike.

The rest of Respondent's *Hitchcock* argument essentially amounts to cutting and pasting the

Eleventh Circuit's decision into the Opposition (Opp. 38-41) and tacking on a blanket contention that the appellate court's analysis is not inconsistent with any decision from this Court (Opp. 42). Under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), however, the Hitchcock errors rendered Ferguson's death sentences invalid if they "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637-638. The Eleventh Circuit's conclusion that the *Hitchcock* errors did not have a substantial and injurious effect on the jury's deliberations and sentence conflicts with the Court's repeated emphasis on the importance of mitigating evidence—especially mental-health evidence—in shaping a jury's assessment of moral culpability.

## CONCLUSION

The Eleventh Circuit—first in *Porter* and now with Ferguson—has twice disregarded powerful mitigation evidence that would have established the " 'kind of troubled history [the Court] ha[s] declared relevant to assessing a defendant's moral culpability.' " *Porter*, 130 S. Ct. at 454 (quoting *Wiggins*, 539 U.S. at 535). As in *Porter*, the staggeringly deficient performance of Ferguson's lawyers left the jurors to gauge Ferguson's moral culpability knowing nothing of his mental health history and the bleak circumstances of his childhood.

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of this Court's intervening decision in *Porter*.

Respectfully submitted,

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